SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* VERNON WATTS

UNITED STATES *v.* CHERYL PUTRA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–1906. Decided January 6, 1997

PER CURIAM.

In these two cases, two panels of the Court of Appeals for the Ninth Circuit held that sentencing courts could not consider conduct of the defendants underlying charges of which they had been acquitted. *United States* v. *Watts*, 67 F. 3d 790 (CA9 1995) ("*Watts*"); *United States* v. *Putra*, 78 F. 3d 1386 (CA9 1996) ("*Putra*"). Every other Court of Appeals has held that a sentencing court may do so, if the Government establishes that conduct by a preponderance of the evidence.[1] The Government filed a single petition for certiorari seeking review of both cases, pursuant to this Court's Rule 12.4, to resolve this split. Because the panels' holdings

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[1] *United States* v. *Boney*, 977 F. 2d 624, 635–636 (CADC 1992); *United States* v. *Mocciola*, 891 F. 2d 13, 16–17 (CA1 1989) (criticized in dicta in *United States* v. *Lanoue*, 71 F. 3d 966, 984 (CA1 1995)); *United States* v. *Rodriguez-Gonzalez*, 899 F. 2d 177, 180–182 (CA2), cert. denied, 498 U. S. 844 (1990); *United States* v. *Ryan*, 866 F. 2d 604, 608–609 (CA3 1989); *United States* v. *Isom*, 886 F. 2d 736, 738–739 (CA4 1989); *United States* v. *Juarez-Ortega*, 866 F. 2d 747, 748–749 (CA5 1989) *(per curiam)*; *United States* v. *Milton*, 27 F. 3d 203, 208–209 (CA6 1994), cert. denied, 513 U. S. ___ (1995); *United States* v. *Fonner*, 920 F. 2d 1330, 1332–1333 (CA7 1990); *United States* v. *Dawn*, 897 F. 2d 1444, 1449–1450 (CA8), cert. denied, 498 U. S. 960 (1990); *United States* v. *Coleman*, 947 F. 2d 1424, 1428–1429 (CA10 1991), cert. denied, 503 U. S. 972 (1992); *United States* v. *Averi*, 922 F. 2d 765, 765–766 (CA11 1991) *(per curiam)*.

conflict with the clear implications of 18 U. S. C. §3661, the Sentencing Guidelines, and this Court's decisions, particularly *Witte* v. *United States*, 515 U. S. ___ (1995), we grant the petition and reverse in both cases.

In *Watts*, police discovered cocaine base in a kitchen cabinet and two loaded guns and ammunition hidden in a bedroom closet of Watts' house. A jury convicted Watts of possessing cocaine base with intent to distribute, in violation of 21 U. S. C. §841(a)(1), but acquitted him of using a firearm in relation to a drug offense, in violation of 18 U. S. C. §924(c). Despite Watts' acquittal on the firearms count, the District Court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense. In calculating Watts' sentence, the court therefore added two points to his base offense level under United States Sentencing Commission, Guidelines Manual §2D1.1(b)(1) (Nov. 1995) (USSG). The Court of Appeals vacated the sentence, holding that "a sentencing judge may not, 'under *any* standard of proof,' rely on facts of which the defendant was acquitted." 67 F. 3d, at 797 (quoting *United States* v. *Brady*, 928 F. 2d 844, 851, and n. 12 (CA9 1991), abrogated on other grounds, *Nichols* v. *United States*, 511 U. S. 738 (1994)) (emphasis added in *Watts*). The Government argued that the District Court could have enhanced Watts' sentence without considering facts "necessarily rejected" by the jury's acquittal on the §924(c) charge because the sentencing enhancement did not require a connection between the firearm and the predicate offense, whereas §924(c) did. The court rejected this argument, stated that both the enhancement and §924(c) involved such a connection, and held that the District Court had impermissibly "reconsider[ed] facts that the jury necessarily rejected by its acquittal of the defendant on another count." 67 F. 3d, at 796.

In *Putra*, authorities had videotaped two transactions in which Putra and a codefendant (a major drug dealer) sold cocaine to a government informant. The indictment charged Putra with, among other things, one count of

aiding and abetting possession with intent to distribute one ounce of cocaine on May 8, 1992; and a second count of aiding and abetting possession with intent to distribute five ounces of cocaine on May 9, 1992, both in violation of 21 U. S. C. §841(a)(1) and 18 U. S. C. §2. The jury convicted Putra on the first count but acquitted her on the second. At sentencing, however, the District Court found by a preponderance of the evidence that Putra had indeed been involved in the May 9 transaction. The District Court explained that the second sale was relevant conduct under USSG §1B1.3, and it therefore calculated Putra's base offense level under the Guidelines by aggregating the amounts of both sales. As in *Watts*, the Court of Appeals vacated and remanded for resentencing. Reasoning that the jury's verdict of acquittal manifested an "explicit rejection" of Putra's involvement in the May 9 transaction, the Court of Appeals held that "allowing an increase in Putra's sentence would be effectively punishing her for an offense for which she has been acquitted." 78 F. 3d, at 1389. The panel explained that it was imposing "a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines." *Ibid.* Then-Chief Judge Wallace dissented, arguing that the panel's "sweeping language contradicts the Guidelines, our practice prior to enactment of the Guidelines, decisions of other circuits, and recent Supreme Court authority." *Id.*, at 1390.

We begin our analysis with 18 U. S. C. §3661, which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information. The statute states:

> "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

We reiterated this principle in *Williams* v. *New York*,

337 U. S. 241 (1949), in which a defendant convicted of murder and sentenced to death challenged the sentencing court's reliance on information that the defendant had been involved in 30 burglaries of which he had not been convicted. We contrasted the different limitations on presentation of evidence at trial and at sentencing: "Highly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.*, at 247 (footnote omitted); see *Nichols, supra,* at 747 (noting that sentencing courts have traditionally and constitutionally "considered a defendant's past criminal behavior, even if no conviction resulted from that behavior") (citing *Williams, supra*); *BMW of North America, Inc.* v. *Gore,* 517 U. S. ___, ___ n. 19 (1996) (slip op., at 12, n. 19) ("A sentencing judge may even consider past criminal behavior which did not result in a conviction") (citing *Williams, supra*). Neither the broad language of §3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing. Indeed, under the pre-Guidelines sentencing regime, it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." *United States* v. *Donelson*, 695 F. 2d 583, 590 (CADC 1982) (Scalia, J.).

The Guidelines did not alter this aspect of the sentencing court's discretion. "'[V]ery roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment.'" *Witte, supra,* at ___ (slip op., at 13) (quoting *United States* v. *Wright*, 873 F. 2d 437, 441 (CA1 1989) (Breyer, J.)). Section 1B1.4 of the Guidelines reflects the policy set forth in 18 U. S. C. §3661:

> "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U. S. C. §3661."

Section 1B1.3, in turn, describes in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range. The commentary to that section states: "Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." USSG §1B1.3 comment., backg'd. With respect to certain offenses, such as Putra's drug conviction, USSG §1B1.3(a)(2) requires the sentencing court to consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." Application Note 3 explains that "[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts." The Note also gives the following example:

> "[W]here the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales."

Accordingly, the Guidelines conclude that "[r]elying on the entire range of conduct, regardless of the number of counts that are alleged *or on which a conviction is obtained*, appears to be the most reasonable approach to writing workable guidelines for these offenses." USSG §1B1.3 comment., backg'd (emphasis added).

Although the dissent concedes that a district court may properly consider "evidence adduced in a trial that

resulted in an acquittal" when choosing a particular sentence within a guideline range, it argues that the court must close its eyes to acquitted conduct at earlier stages of the sentencing process because the "broadly inclusive language of §3661" is incorporated only into §1B1.4 of the Guidelines. This argument ignores §1B1.3 which, as we have noted, directs sentencing courts to consider all other related conduct, whether or not it resulted in a conviction. The dissent also contends that because Congress instructed the Sentencing Commission, in 28 U. S. C. §994(*l*), to ensure that the Guidelines provide incremental punishment for a defendant who is convicted of multiple offenses, it could not have meant for the Guidelines to increase a sentence based on offenses of which a defendant has been acquitted. *Post*, at 10. The statute is not, however, "cast in restrictive or exclusive terms." *United States* v. *Ebbole*, 917 F. 2d 1495, 1501 (CA7 1990). Far from limiting a sentencing court's power to consider uncharged or acquitted conduct, §994(*l*) simply ensures that, at a minimum, the Guidelines provide additional penalties when defendants are convicted of multiple offenses. *Ibid.* If we accepted the dissent's logic, §944(*l*) would prohibit a district court from considering acquitted conduct for any sentencing purposes, whether for setting the guidelines range or for choosing a sentence within that range—a novel proposition that the dissent itself does not defend. *Post*, at 4. In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted.

The Court of Appeals' position to the contrary not only conflicts with the implications of the Guidelines, but it also seems to be based on erroneous views of our uouble jeopardy jurisprudence. The Court of Appeals asserted that, when a sentencing court considers facts underlying a charge on which the jury returned a verdict of not guilty, the defendant "'suffer[s] punishment for a criminal charge for which he or she was acquitted.'" *Watts*, 67 F. 3d. at 797 (quoting *Brady*, 928 F. 2d, at 851). As

we explained in *Witte*, however, sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction. 515 U. S., at ___ (slip op., at 13). In *Witte*, we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Id.*, at ___ (slip op., at 12). Rather, the defendant is "punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment . . . ." *Id.*, at ___ (slip op., at 13); see also *Nichols*, 511 U. S., at 747.

The Court of Appeals likewise misunderstood the preclusive effect of an acquittal, when it asserted that a jury "rejects" some facts when it returns a general verdict of not guilty. *Putra*, 78 F. 3d, at 1389 (quoting *Brady*, *supra*, at 851). The Court of Appeals failed to appreciate the significance of the different standards of proof that govern at trial and sentencing. We have explained that "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 361 (1984). As then-Chief Judge Wallace pointed out in his dissent in *Putra*, it is impossible to know exactly why a jury found a defendant not guilty on a certain charge.

> "[A]n acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without

> specific jury findings, no one can logically or realistically draw any factual finding inferences . . . ." 78 F. 3d, at 1394.

Thus, contrary to the Court of Appeals' assertion in *Brady*, *supra*, at 851, the jury cannot be said to have "necessarily rejected" any facts when it returns a general verdict of not guilty.

For these reasons, "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling* v. *United States*, 493 U. S. 342, 349 (1990). The Guidelines state that it is "appropriate" that facts relevant to sentencing be proved by a preponderance of the evidence, USSG §6A1.3 comment., and we have held that application of the preponderance standard at sentencing generally satisfies due process. *McMillan* v. *Pennsylvania*, 477 U. S. 79, 91–92 (1986); *Nichols*, *supra*, at 747–748. We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence.[2] The cases

[2]See *McMillan*, 477 U. S., at 88 (upholding use of preponderance standard where there was no allegation that the sentencing enhancement was "a tail which wags the dog of the substantive offense"); *Kinder* v. *United States*, 504 U. S. 946, 948–949 (1992) (White, J., dissenting from denial of certiorari) (acknowledging split); *United States* v. *Kikumura*, 918 F. 2d 1084, 1102 (CA3 1990) (holding that clear-and-convincing standard is implicit in 18 U. S. C. §3553(b), which requires a sentencing court to "find" certain facts in order to justify certain large upward departures; not reaching the due process issue); *United States* v. *Gigante*, 39 F. 3d 42, 48 (CA2 1994), as amended, 94 F. 3d 53, 56 (1996) (not reaching due process issue; "In our view, the preponderance standard is no more than a *threshold* basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures. . . . Where a higher standard, appropriate to a substantially enhanced sentence range, is not met, the court should depart downwardly"); *United States* v. *Lombard*, 72 F. 3d 170, 186–187 (CA1 1995) (authorizing downward departure in "an unusual and perhaps a singular case" that may have "exceeded" constitutional limits, where acquitted conduct calling for a "enormous" sentence enhancement "is itself very serious conduct," "where the ultimate sentence is itself enormous, and where the judge is seemingly mandated to impose that sentence"); see also *United States* v. *Townley*, 929 F. 2d 365, 369 (CA8 1991) ("At the very least, *McMillan* allows for the possibility that the preponderance standard the Court approved for garden variety sentencing determinations may fail to comport with due process where, as here, a sentencing enhancement factor becomes 'a tail which wags the dog of the substantive offense'") (quoting *McMillan*, *supra*, at 88); *United States* v. *Restrepo*, 946 F. 2d 654, 656, n. 1 (CA9 1991) (en banc) (suggesting that clear and convincing evidence might be required for extraordinary upward adjustments or departures), cert. denied, 503 U. S. 961 (1992); *United States* v. *Lam Kwong-Wah*, 966 F. 2d 682, 688 (CADC) (same), cert. denied, 506 U. S. 901 (1992); *United States* v. *Trujillo*, 959 F. 2d 1377, 1382 (CA7) (same), cert. denied, 506 U. S. 897 (1992). But see *United States* v. *Washington*, 11 F. 3d 1510, 1516 (CA10 1993) ("At least as concerns making guideline calculations the issue of a higher than a preponderance standard is foreclosed in this circuit"), cert. denied, 511 U. S. 1020 (1994).

before us today do not present such exceptional circumstances, and we therefore do not address that issue. We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

Accordingly, the Court of Appeals erred in both cases before us today. In *Putra*, the jury simply found that the prosecution had not proved the defendant's complicity in the May 9 sale beyond a reasonable doubt. The acquittal sheds no light on whether a preponderance of the evidence established Putra's participation in that transaction. Likewise, in *Watts*, the jury acquitted the defendant of using or carrying a firearm during or in relation to the drug offense. That verdict does not preclude a finding by a preponderance of the evidence

that the defendant did, in fact, use or carry such a weapon, much less that he simply *possessed* the weapon in connection with a drug offense.

The petition for certiorari is granted, the judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion. Respondent Putra's motion to proceed *in forma pauperis* is granted. The motion of Morris L. Whitman for leave to file a brief as *amicus curiae* is granted.

It is so ordered.